1987

Eckhoff, Watson, Watson and Preator Engineering, Inc., dba Eckhoff, Watson and Preator Engineering, a Utah corporation v. Ralph Memmott, Grace Memmott, Sandra Memmott, Sue Memmott, Delbert Crapo, Syrelda Crapo, Trent Crapo, and Kent Crapo : Brief of Respondent

Utah Court of Appeals

Craig C. Coburn; Attorney for Respondent.
Gregory M. Holbrook; Kipp and Christian; Attorney for Appellant.

IN THE COURT OF APPEALS, STATE OF UTAH

ECKHOFF, WATSON, WATSON AND PREATOR ENGINEERING, INC., dba Eckhoff, Watson and Preator Engineering, a Utah corporation,	:	Case No. 870393-CA
Plaintiff/Respondent,	:	
vs.	:	
RALPH MEMMOTT, GRACE MEMMOTT, SANDRA MEMMOTT, SUE MEMMOTT, DELBERT CRAPO, SYRELDA CRAPO, TRENT CRAPO, and KENT CRAPO,	:	
Defendants/Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT RENDERED BY
THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR JUAB COUNTY, STATE OF UTAH
THE HONORABLE RAY M. HARDING, SR., PRESIDING
CIVIL NO. 5891

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LIST OF PARTIES

Plaintiff-Respondent: Eckhoff, Watson, Watson and Preator Engineering, Inc., dba Eckhoff, Watson and Preator Engineering, a Utah corporation (hereinafter "EWP").

Defendant-Appellant: Ralph Memmott (hereinafter "Memmott")

Other Defendants: Grace Memmott, Sandra Memmott, Sue Memmott, Delbert Crapo, Trent Crapo and Kent Crapo (together with Memmott, hereinafter "Memmott, et al.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is brought pursuant to Utah Code Ann. Sec. 78-28-2(h) (1986). Memmott (hereinafter "Memmott") appeals the findings and judgment rendered by the Honorable Ray M. Harding, Fourth Judicial District Court in and for Juab County, to wit:

1. Memmott entered into a written contract with EWP pursuant to which EWP was to provide certain surveying and related services and Memmott was to compensate EWP therefore;

2. EWP substantially performed its services under said contract;

3. Memmott materially breached his contract with EWP by failing and refusing to compensate EWP as agreed and must pay damages of $6,000 plus interest, costs, and attorneys fees;

4. The other named defendants are not liable to EWP on the subject debt.

Copies of the trial court's Memorandum Decision, Amended Findings of Fact and Conclusions of Law, and Amended Judgment are attached hereto as Appendices A through C, respectively.

ISSUES PRESENTED FOR REVIEW

1. Was Plaintiff's Exhibit 1, a copy of the contract between EWP and Memmott, properly admitted in to evidence.

2. Has Memmott marshalled all of the evidence in support of the trial court's findings of fact.

3. Has Memmott considered the evidence which supports the trial court's findings of fact in a light most favorable to those findings.

4. Has Memmott demonstrated that the trial court's findings of fact are clearly erroneous.

5. Is Memmott's appeal regarding the liability of his co-defendants properly before this Court.

6. Did Memmott have actual or apparent authority to enter into a contract with EWP on behalf of all of the defendants.

DETERMINATIVE STATUTES AND RULES

1. **Utah Code Annotated Sect 78-25-16 (1953):**

Parole Evidence of Contents of Writings-When Admissible. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(1) When the original has been lost or destroyed, in which case proof of the loss or destruction must first be made.

(2) When the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice.

(3) When the original is a record or other document in the custody of a public officer.

(4) When the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute.

(5) When the original consists of numerous accounts or other documents which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business is caused any or all of the same to be recorded, copied or reproduced by any

photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, was satisfactorily identified, is as admissible in evidence as the original itself and any judicial or administrative proceeding whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of Court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

In the cases mentioned in subdivisions (3) and (4), a copy of the original, or of the record, must be produced; and those mentioned in subdivisions (1) and (2), either a copy of oral evidence of the contents.

2. Utah Rules of Evidence, Rule 1002:

Requirement of Original. To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this state or by statute.

3. **Utah Rules of Evidence, Rule 1003:**

Admissibility of Duplicates. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

4. **Utah Rules of Evidence, Rule 1004:**

Admissibility of Other Evidence and Contents. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Original is lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

5. **Utah Rules of Civil Procedure, Rule 52(a) (1987):**

Findings by the Court. (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56 and 59 when the motion is based on more than one ground.

STATEMENT OF THE CASE

EWP initiated litigation against Memmott, et al. for, inter alia, breach of written contract arising out of the defendants' failure to compensate EWP for surveying and related services provided under said contract. EWP's services were provided to assist Memmott, et al. in severance proceedings involving U.S. Interstate 15 and mining claims jointly owned by the named defendants. Memmott, et al. defended on the basis that EWP had charged more than agreed for its services, that they had not signed the contract, and/or that the services provided by EWP were neither what was requested nor what was needed.

Trial was had January 6,1987, before the Honorable Ray M. Harding Sr., sitting without a jury, in the Fourth Judicial District Court, Juab County, State of Utah. EWP appeared through its duly authorized representative, Ralph E. Watson, and with counsel. Memmott and co-defendants Delbert Crapo and Sandra Memmott appeared with counsel. No other co-defendants appeared. Following trial on the merits, the Court rendered judgment in favor of EWP against Memmott. True and correct copies of the trial court's Memorandum Decision, Amended Findings of Fact and Conclusions of Law, and Amended Judgment, are appended hereto as Appendices A through C.

STATEMENT OF FACTS

1. The named defendants jointly own 52 or more placer mining claims located in Juab and/or Millard Counties, State of Utah. (Transcript: pgs. 13, 28, 29, 129, 159)

2. U.S. Interstate 15 (I-15) crosses over some of the defendants' mining claims. (Transcript: pgs. 13, 24)

3. Because of the overlap of I-15 and the subject mining claims, the defendants were involved in severance proceedings with the State of Utah. (Transcript: pgs. 14-16, 26-28)

4. Memmott and Delbert Crapo approached EWP in September of 1983 to discuss surveying services to be provided by EWP to assist Memmott and Crapo in the proceedings. (Transcript: pgs. 21, 24, 35, 64)

5. EWP's services were initiated in the field on October 17, 1983. (Transcript: pgs. 44, 67)

6. At the end of the work day on October 17, 1983, Memmott signed a document, the identity and contents of which were at issue at trial. (Transcript: pgs. 20, 39, 62-63)

7. Memmott identified the document he signed as "standard work authorization" which authorized EWP to survey the ground and/or allowed EWP to avoid trespass claims and described the document as a blank sheet of paper containing only his signature and the date. Said document was from a pad of such forms possessed by Ralph Watson (Watson) of EWP. (Transcript: pgs. 39, 147)

8. EWP claimed that the document Memmott signed was the

standard form contract used by EWP with its clients and was in fact the only such form used by EWP. (Transcript: pgs. 46, 59-60; Plaintiff's Exhibit 1 (Appendix D))

9. EWP does not use a form such as that described by Memmott. (Transcript: pgs. 194-195)

10. Watson completed the contract for Memmott's signature while riding in EWP's survey vehicle with Doug Grimshaw (Grimshaw) on the way from Levan, Utah to the job-site on October 17, 1983. Watson and Grimshaw discussed the need to have Memmott sign the contract that day. (Transcript: pgs. 46-47, 49-50, 62-63)

11. Memmott's signature appears in the bottom left-hand corner of Plaintiff's Exhibit 1. (Transcript: pg. 33)

12. EWP's standard practice was to retain the original of contracts with clients and to mail a copy of the same to the client. (Transcript: pgs. 59-60)

13. EWP was unable to produce the original of the contract at trial. EWP made a thorough and diligent search of its files in an attempt to locate the original but was unsuccessful. EWP found a copy of the document in the Memmott project file. (Transcript: pgs. 60-61)

14. On September 30, 1986, EWP notified Memmott, et al. that the contents of the contract would be the subject of proof at trial and that a copy of the same would be used for such purposes. (Fourth District Court, Juab County, Civil No. 5891; Pleading entitled "Notice")

15. Plaintiff's Exhibit 1 was offered and accepted into evidence by the Court over Memmott, et al.'s objections. (Transcript: pg. 63)

16. The UDOT strip map was based upon a survey utilizing the State Plane Coordinate System and the mining claims were located according to a survey coordinate system established by the GLO, which systems are wholly independent.

17. Memmott either showed or directed EWP to the location of several GLO section corners in the project area. (Transcript: pgs. 49, 101)

18. EWP found some ten or twelve GLO section corners in the field. (Transcript: pg. 49)

19. Two or more of the GLO section corners referred to by Memmott had been destroyed by the construction of I-15. (Transcript: pgs. 52, 102)

20. Of the ten or twelve GLO section corners located, EWP used approximately one-half in its survey. (Transcript: pgs. 52, 102)

21. Of the five or six GLO section corners used in the EWP survey, the UDOT right-of-way survey tied into only two such corners. (Transcript: pgs. 104-105, 111)

22. EWP's field effort totalled 25 1/2 hours of surveying and related travel plus expenses. (Transcript: pgs. 44-45, 67)

23. EWP provided three separate items of information:

a. The GLO map reflecting the location of the mining claims and the centerline for I-15;

b. The I-15 UDOT strip map reflecting the highway right-of-way as-designed versus the location of the twelve affected claims;

c. A plat or map reflecting the two points where UDOT had tied their survey into the GLO coordinate system. This plat further reflected the discrepancies between I-15 as designed (as per the right-of-way strip map) and as-built. (Transcript: Pgs. 70-78, 129)

24. Memmott claims that the information provided by EWP was useless for purposes of the severance hearing. (Transcript: 140-145)

25. Prior to retaining EWP, Memmott and Delbert Crapo had requested the same services and received comparable information from two other surveying firms. (Transcript: Pgs. 11-12, 30)

26. Memmott has never tried to use the information provided by EWP in the severance proceedings and does not know whether such information was sufficient for such purposes. (Transcript: Pg. 155)

27. Memmott admits that EWP is owed compensation for its services but contests the amount claimed by EWP. (Transcript: pgs. 156-157)

29. The additional information which Memmott contends was required but was not provided would have given only the as-built location of I-15 versus the mining claims where GLO section lines cross the right-of-way and would have indicated nothing with respect to the location of I-15 and the mining claims between the

section lines. (Transcript: pgs. 185-188)

30. The effort required to provide an as-built survey for the length of I-15 as it affects the subject mining claims was considerably more expensive than as requested by Memmott. (Transcript: pgs. 135, 185-188)

31. EWP reflected bearings and distances along GLO section lines to the I-15 right-of-way as-built at the two places where UDOT had made the same tie in surveying for the right-of-way strip map because they were the only instances where a useful comparison could be made between I-15 as-built and as-designed. (Transcript: pgs. 123)

32. Memmott and Delbert Crapo did not have actual authority to contract with EWP on behalf of the other co-defendants. (Transcript: pgs. 37-38)

SUMMARY OF ARGUMENTS

I. The trial court properly admitted Plaintiff's Exhibit 1 into evidence in that the same constituted other and secondary evidence of the contract between EWP and Memmott. EWP established that, more probably than not, the original had either been lost, destroyed or was in the possession of Memmott and that the copy was otherwise authentic. EWP further gave due notice to Memmott that it intended to make a copy of the contract the subject of proof at trial.

II. Memmott has failed to sustain his burden on appeal in that he has failed to marshall all of the evidence which supports the trial court's findings and has failed to establish that such findings were clearly erroneous (i.e., that the evidence supporting the trial court's findings was insufficient to support said findings when viewed in a light most favorable thereto.

III. Memmott's appeal of the trial court's findings that the co-defendants are not liable to EWP and/or that there was no evidence that they were responsible to Memmott for contribution may not be properly before this Court and/or may be without merit. Memmott did not and has not made any cross-claims against his co-defendants for contribution or otherwise. The evidence at trial indicated that Memmott had no actual authority to represent his co-defendants in dealing with EWP; nor was there any evidence that Memmott and the co-defendants were engaged in joint operation of the subject mining claims giving arise to a claim of apparent authority.

ARGUMENT

I. PLAINTIFF'S EXHIBIT 1, A COPY OF THE CONTRACT BETWEEN EWP AND MEMMOTT, WAS PROPERLY ADMITTED INTO EVIDENCE BY THE TRIAL COURT.

Memmott challenges the propriety of the trial court's admission of Plaintiff's Exhibit 1 into evidence. Plaintiff's Exhibit 1 (Appendix D) was a photocopy of the EWP form contract signed by Memmott. Memmott challenged its admission on the basis that the exhibit was not the original of the contract.

Under the Utah Rules of Evidence, the general rule is that the original contract is required to prove the content of that contract. Utah R. Evid. 1002. However, this rule is expressly subject to certain exceptions. id. For example, a duplicate is admissible to the same extent as an original except where there is a genuine question as to the authenticity of the original or admission of a duplicate on the same footing as an original would be unfair under the circumstances. id., 1003. Thus, in some instances (as in the case at bar) a duplicate is not admissible to the same extent as an original. This does not mean however that a duplicate is not admissible. To be sure, an original is not required and other evidence of its contents is admissible if, inter alia, the original has been lost or destroyed or is in the possession of the opponent against whom it is offered. Id., 1004; UTAH CODE ANN. Sect. 78-25-16 (1953).

Rules 1002-1004 and Sect. 78-25-16 are essentially codifications of the "best evidence rule" and its exceptions. Caselaw interpreting both the codified and common law rules are

unanimous in their declaration that other or secondary evidence is admissable upon an adequate showing that the "best" evidence can't be found. Meyer v. General American Corp., 569 P.2d 1094 (Utah 1977); see, also, Amoco Production Co. v. United States, 455 F. Supp 46 (D.C. Utah 1977); Idaho First National Bank v. Wells, 596 P.2d 429 (Idaho 1979). EWP submits that it made such a showing at trial.

In its effort to have a copy of the contract admitted into evidence as Plaintiff's Exhibit 1, EWP went to great lengths to establish the authenticity of the exhibit. For example:

1. Plaintiff's Exhibit 1 is a sample of the only form contract used by EWP with its clients.

2. Watson prepared the original of Plaintiff's Exhibit 1 for Memmott's signature in the presence of Grimshaw.

3. Watson and Grimshaw discussed the need to have Memmott sign the contract on October 17, 1983.

4. Watson saw Memmott sign the contract on October 17, 1983.

5. Memmott signed a document on October 17, 1983.

6. The signature which appears in the bottom left-hand corner of the front page of Plaintiff's Exhibit 1 is in fact a true and correct copy of Memmott's signature.

Watson further provided a detailed explanation as to why the original was not to be found, including EWP's normal office procedure for the handling of original contracts, where that procedure might have broken down in this instance, the efforts

undertaken by EWP to find the original of the contract and, finally, where Plaintiff's Exhibit 1 was ultimately found. EWP also duly and timely notified Memmott that the copy of the contract would be the subject of proof at trial as required by Rule 1004(3).

Memmott argued that admission of the evidence under the circumstances was unfair. In support of this argument, Memmott claims that he did not sign Plaintiff's Exhibit 1; yet he has never explained how his signature got there. He did admit signing a document which, as per Memmott's testimony, granted permission to EWP to survey the property; yet the document described (i.e., an otherwise blank sheet of paper with nothing on it other than Memmott's signature and the date) could hardly be interpreted as granting EWP authority to survey the property. Memmott has not even produced the document he purportedly signed. Memmott contends that the document he signed was a standard work authorization form from a pad possessed by Watson; yet Watson and Grimshaw testified that EWP uses only one form contract and that was the type found in Plaintiff's Exhibit 1. Finally, Memmott argues that admission was improper because EWP did not offer any testimony as to what terms were in the agreement; apparently ignoring basic axioms of the law that a document speaks for itself and a copy is the best secondary evidence of the contents of a document. In short, the factual support for the trial court's admission of Plaintiff's Exhibit 1 into evidence is not only substantial and competent, it is infinitely more reliable

than that offered by Memmott against such admission. Accordingly, the trial court's admission of Plaintiff's Exhibit 1 was proper.

II. MEMMOTT HAS FAILED TO SUSTAIN HIS BURDEN ON APPEAL.

Memmott assails the findings of the trial court on the ground that the evidence at trial was insufficient to support said findings. The challenge is raised on two fronts, to wit: 1) that Memmott signed Plaintiff's Exhibit 1; and 2) that EWP substantially performed its obligations under its agreement with Memmott.

Appellate court review of a trial court's findings of fact is governed by Rule 52(a), U.R.Civ.P. (amended 1987), which, in its pertinent parts, reads as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. [emphasis added]

To establish that the trial court's findings are clearly erroneous, it is necessary for the appellant to:

> [M]arshall all of the evidence in support of the trial court's findings and to then demonstrate that even when viewed in the light most favorable to the factual determinations made by trial court, that the evidence is insufficient to support its findings.

Harline v. Campbell, 728 P.2d 980, 982 (Utah 1986); see also, Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985); Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. 1987).

In short, Memmott must accomplish three things to be successful in challenging the findings of the trial court based upon insufficiency of the evidence, to wit:

1. Marshal all of the evidence in support of the trial court's findings;

2. Review all such evidence in a light most favorable to the trial court's findings; and,

3. Demonstrate that all such evidence, when viewed in such a light, is insufficient to support the trial court's findings.

EWP submits that Memmott has failed to sustain his burden on all three counts.

A. Memmott has failed to marshal all of the evidence which supports the trial court's findings.

Memmott's threshhold burden in challenging the trial court's findings is to marshal all of the evidence in support of those findings. EWP submits that Memmott has utterly failed to sustain this burden. To be sure, Memmott has marshalled only the evidence that Memmott himself concludes was "presumably relied upon" by the trial court in support of its findings. (Appellant's Brief: pg. 11) Memmott's selective approach is further reflected in his brief wherein he concludes that the trial court's evidentiary basis "appear[s]" to be based upon certain selected exhibits "among other items" and "primarily" the testimony of EWP's Ralph Watson. (id.)

That Memmott's selective approach to marshalling the evidence is one of convenience, if not necessity, becomes obvious

upon an examination of the evidence which Memmott has ignored in his appeal. For example, in his challenge to the court's finding that he signed the EWP form contract, Memmott does not mention that:

1. On the way to the job site on October 17, 1983, Watson prepared the contract for Memmott's signature and asked Grimshaw to remind him to have Memmott sign the contract that day.

2. The contract signed by Memmott was the only form contract or authorization used by EWP.

3. The signature which appears in the bottom left-hand corner of the front-page of Plaintiff's Exhibit 1 is in fact a true and correct copy of Memmott's signature.

These facts are clearly supportive of the trial court's finding that Memmott signed the EWP form contract; yet they are ignored by Memmott in his appeal.

Similarly, in his challenge to the trial court's finding that EWP substantially performed its contract, Memmott fails to mention that:

1. Memmott and Crapo had previously asked two other surveying firms to provide the same service as was requested of EWP and these firms provided essentially the same work product as was provided by EWP.

2. Memmott never tried to use the information provided by EWP in the severance hearing and in fact does not know whether it was sufficient for that purpose.

3. Memmott admits that EWP is owed money for its services and his dispute, at least initially, was not as to the existence of the debt, but rather as to the amount.

4. The information provided by EWP to Memmott did reflect, inter alia, the location of the twelve impacted mining claims versus the I-15 right-of-way as shown on the UDOT strip maps and, further, compared the location of I-15 as-designed versus as-built at the only two points where UDOT had tied into the same survey coordinate system used in locating the mining claims.

5. The additional information which Memmott contends was required but was not provided would have given only the as-built location of I-15 versus the mining claims where GLO section lines cross the right-of-way and would have indicated nothing with respect to the location of I-15 and the mining claims between the section lines.

6. The effort required to provide an as-built survey of I-15 versus the location of the mining claims for the entire length of the pertinent sections of I-15 would have required a much more expensive effort than that which was requested by Memmott.

(These are but some of the facts which Memmott fails to consider in this appeal; still others appear under sub-point B. which follows.)

The import of these facts on the trial court's findings can scarcely be overstated. Memmott and Crapo claimed that EWP did

not provide the information they requested,; yet by their own testimony they had, previous to contacting EWP, made the same request of two other surveying firms and received information effectively identical to that provided by EWP. Not only did this confirm that Memmott had received that which he had requested, it confirmed EWP's contention that the services provided by EWP were consistent with accepted surveying practice and its limitations. Memmott, et al. also argued that the information EWP provided was useless in the severance hearing; yet they never tried to use it in the hearing. In fact, the only competent evidence is that the information was adequate for this purpose and the trial court so concluded.

By ignoring crucial evidence which clearly supports the trial court's findings, Memmott has failed to meet his "threshold burden on appeal, one that is neither elective nor optional." Fitzgerald, supra at 16. And this Court will not do Memmott's job for him. id. Under these circumstances, this Court can reach but one conclusion: that the findings of the trial court were not clearly erroneous and will not be disturbed. Ashton, supra.

B. Memmott has failed to consider the evidence which supports the trial court's findings in a light most favorable to those findings.

As previously noted, Memmott has failed to marshal all of the evidence in support of the trial court's findings. However, assuming arguendo that Memmott has sustained this threshhold burden, he has nonetheless failed to sustain yet another aspect of his burden on appeal. Specifically, Memmott has failed to

discuss the evidence in support of the trial court's findings in a light most favorable to those findings.

Of the facts which Memmott chose to discuss on appeal and which support the trial court's findings, Memmott has nonetheless misinterpreted and/or quoted many out of context in an effort to lend support to his own version of the facts, as opposed to how they were found by the trial court. For example:

1. Memmott contends that the number of GLO section monuments "that had been identified and shown EWP was in excess of twelve", (Appellant's Brief: Pg. 9) In fact, EWP was either shown or directed to some GLO corners, of which it was able locate some "ten or twelve." Two or more of the GLO section corners which Memmott said existed had in fact been destroyed during the construction of I-15.

2. Memmott also attempts to use the language quoted in item 1. to imply that the number of ties EWP should have made to the mining claims should equal the number of GLO section corners located. In fact, of the "ten or twelve" GLO section corners which were actually found, EWP felt only five or six were possibly useful in its effort to obtain surveying information.

3. Of the five or six GLO section corners which EWP utilized in its surveying effort, the UDOT survey for I-15 had been tied into only two.

4. Memmott supposedly signed a "standard work authorization" provided by Watson granting EWP the authority

to perform the survey and/or avoid trespass claims; yet Memmott described a document that was blank, save for his signature and the date.

5. Memmott states that "EWP's survey crew spent two days surveying in the field", the implication being that a normal eight-hour work day was involved. (Appellant's Brief: pg. 8) In fact, EWP spent twenty-five and one-half (25-1/2) hours over two days in the field.

6. Memmott states that EWP's services could have been provided a third of the cost (Appellant's Brief: pg. 14); yet the trial court specifically found that EWP's charges were reasonable.

7. Memmott argues "it is also clear that only Mr. Watson saw Mr. Ralph Memmott sign anything despite Mr. Watson, Mr. Grimshaw, Mr. Crapo and Ms. Memmott all being present at the time." (Appellant's Brief: Pg. 16) In fact, Memmott admits to signing something, if not Plaintiff's Exhibit 1. Furthermore, Delbert Crapo testified, or at least implied in his testimony, that Memmott signed "the blank work order sheet ... ." (Transcript: Pg. 20) Finally, although Crapo, Grimshaw and Ms. Memmott were also on site the day the contract was signed, the evidence suggests that only Memmott and Watson were in a position to testify as to what was actually signed. (Transcript: pg. 118)

These are but a few examples of where Memmott has failed to

discuss the evidence which supports the trial court's findings in the manner required by law. Indeed, he has again ignored a substantial portion of this evidence.

EWP submits that Memmott's selective use and interpretation of the evidence given at trial does not rise to the level of viewing the evidence which supports the trial court's findings in a light most favorable to those findings. He has done nothing more than present and argue his version of the facts. Because he has failed to consider the evidence in a light most favorable to the trial court's findings, Memmott's appeal must fail. Harline; Ashton; Scharf; Fitzgerald, supra.

C. Memmott has failed to demonstrate that the trial court's findings were clearly erroneous.

Again, assuming arguendo that Memmott has marshalled all of the evidence in favor of the trial court's findings and that he has addressed such evidence in a light most favorable to those findings, he has nonetheless failed to demonstrate that such evidence was insufficient to support those findings and that, accordingly, the trial court's findings were clearly erroneous.

By way of example, consider Memmott's challenge to the trial court's findings that he signed the EWP form contract. There is ample evidence in the record to suggest that he did in fact sign that document. Most telling is the fact that his signature appears on a copy of the contract. Despite such evidence, he contended that he did not sign that document; yet he offered no explanation as to how his signature got there, he did not produce the document he says he signed, nor did he convince anyone, let

alone the trial court, that a blank sheet of paper with his signature on it constitutes an authorization to survey property.

Consider also Memmott's challenge to the trial court's findings that EWP substantially performed its contract. Memmott requested and received virtually identical services and information from three different surveying firms, including EWP; yet his defense was, inter alia, that he did not receive what he requested. He argued that the information EWP provided was useless; yet he never tried to use it. As previously noted, there is no competent evidence that that information was anything but sufficient for the severance hearings.

Memmott has simply failed to demonstrate that the evidence which supports the trial court's findings is insufficient and, as such, that the trial court's findings are clearly erroneous. What Memmott has demonstrated, if nothing else, is that there was a conflict in the evidence at trial. Conflicts in the evidence are not sufficient to disturb the findings of the trier-of-fact as this Court will not substitute its judgment for that of the trial court. Rule 52(a), supra.; Chandler vs. Mathews, 734 P.2d 907 (Utah 1987); Circle Air Freight vs. Boyce Equipment, 745 P.2d 828 (Utah App. 1987); Gillmor vs. Gillmor, 745 P.2d 461 (Utah App. 1987). In short, Memmott has failed to sustain the third aspect of his burden on appeal and his appeal, therefor, must fail. Harline; Ashton; Scharf; Fitzgerald; supra.

III. MEMMOTT'S APPEAL REGARDING THE LIABILITY OF THE CO-DEFENDANTS MAY NOT BE PROPERLY BEFORE THIS COURT AND/OR MAY BE WITHOUT MERIT.

Memmott contends that the trial court erred in concluding that his co-defendants were not directly liable to EWP on the debt and that there was no evidence that they were liable to Memmott in contribution. EWP believes that Memmott's co-defendants are in fact liable to EWP for the services rendered by EWP and attempted to establish this point at trial. However, the trial court concluded otherwise.

EWP does not oppose Memmott's appeal on this point. If in fact Memmott's current counsel continues to represent the remaining co-defendants, as he did at trial, EWP would be willing to stipulate to an amendment of judgment making the remaining co-defendants liable to EWP (if in fact this alternative is available). A second alternative under this scenario would be for the judgment of the trial court to be reversed on this point by the Court and remanded to the trial court for a decision consistent with the Court's ruling.

Regardless of whether Memmott's current counsel continues to represent Memmott's co-defendants, EWP must confess that it does not believe that this aspect of the appeal is properly before this Court. Memmott did not make any cross-claim against his co-defendants at trial. To be sure, the defense of all co-defendants against EWP's claims were initiated, prosecuted, and concluded as a single effort. Under such circumstances it is inconceivable as to how apparently new claims could become a

matter for appeal.

Finally, Memmott testified at trial that he had no actual authority to represent anyone other than himself in his dealings with EWP. Defense counsel at trial echoed this position in closing argument. Memmott has apparently changed his tune and is now apparently attempting to backdoor the issue under the guise of apparent authority by claiming that there was a mining partnership. As Memmott duly notes in his argument, joint operation is a prerequisite to a finding of a mining partnership. Mud Control Laboratories vs. Covey, 269 P.2d 854, 2 Utah 2d 85 (Utah 1954). However, there was absolutely no evidence introduced at trial that Memmott and his co-defendants were engaged in both the joint ownership and operation of the subject mining claims. Without joint operation, there is no mining partnership; and without a mining partnership, there can be no apparent authority.

CONCLUSION

The trial court properly admitted Plaintiff's Exhibit 1 as other evidence of the contract between EWP and Memmott. Memmott has failed to sustain his burden on appeal. He has failed to marshal all of the evidence in support of the trial court's findings; he has failed to review such evidence in a light most favorable to the trial court's findings; and, he has failed to demonstrate that such evidence, when viewed in such a light, was

insufficient to support such findings such that said findings were clearly erroneous. Memmott's appeal regarding the liability of co-defendants is not properly before this Court and is otherwise without merit.

EWP repectfully requests that Memmott's appeal be dismissed, that the judgment of the trial court be affirmed, and that EWP be awarded costs and attorney's fees on appeal and/or that the matter be remanded to the trial court for determination and award of attorneys fees.

REPECTFULLY SUBMITTED this 25 day of February, 19 88.

CRAIG C. COBURN
Attorney for Respondent

APPENDIX A

IN THE FOURTH JUDICIAL DISTRICT COURT

JUAB COUNTY, STATE OF UTAH

****

ECKHOFF, WATSON, WATSON & PREATOR, et al.	)	Case Number 5891
Plaintiff,	)	
vs.	)	MEMORANDUM DECISION
RALPH MEMMOTT, et al.,	)	
Defendant.	)	

****

This matter came before the court for trial on January 6, 1987, in Juab County. Plaintiff was present and represented by its attorney, Craig C. Coburn. Defendants were present and represented by their attorney, Gregory M. Holbrook. The court having heard evidence, reviewed the exhibits and having taken the matter under advisement now enters its:

MEMORANDUM DECISION

The plaintiff shall hereafter for simplicity be referred to as EWP. The defendant Ralph Memmott entered into an agreement with EWP on the 17th of October, 1983, wherein EWP would provide certain survey and engineering services to the defendants and the defendants agreed to pay an estimated fee of $6,000.00. The court expressly finds that Mr. Ralph Memmott entered into said agreement individually and there was no evidence introduced that his signing of the written agreement was other than in his own behalf. Whether he has arrangements with the other property owners for contribution is not in evidence. The court finds that the plaintiff substantially performed the

service contracted for and expended time and effort in excess of that estimated and that such expenditures were reasonable. EWP has provided all existing survey ties, location of defendants' mining claims in relationship to the interstate highway as indicated on the Department of Transportation's highway strip maps and further provided the defendant with a GLO map showing the location of the interstate highway as it related to the defendants' claims. Such survey work and office work as was performed by the defendant and the resulting work product was sufficient to substantially comply with the intent of the parties and to satisfy the needs of the defendants.

The court expressly finds that there is no evidence that the other named defendants have any liability under the complaint or the agreement entered into by Mr. Memmott with the plaintiff, and therefore the complaint is dismissed as to those other named parties.

The plaintiff in its complaint having prayed for $6,000.00 only, judgment is granted on plaintiff's second cause of action in the sum of $6,000.00.

The court further awards interest at the rate of 18% per annum until entry of judgment from October 29, 1984. This date of commencement of interest is in accordance with Mr. Watson's testimony as to the commencement of that interest.

There being no evidence as to attorneys' fees, no attorneys' fees are awarded. Plaintiff is awarded costs of court. A cost bill to be entered in accordance with Rule 54(d) Utah Rules of Civil Procedure.

Attorney for the plaintiff to prepare appropriate Findings of Fact, Conclusions of Law and Judgment and submit the same to defendant for approval as to form prior to submission to the court for signature.

DATED this 8th day of January, 1987.

RAY M. HARDING, JUDGE

cc: Gregory M. Holbrook
Craig C. Coburn

APPENDIX B

CRAIG C. COBURN #0688
Attorney for Plaintiff
8 East Broadway, Suite 735
Salt Lake City, Utah 84111
Telephone: (801) 355-1300

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTATH

ECKHOFF, WATSON, WATSON AND PREATOR ENGINEERING, INC., dba Eckhoff, Watson and Preator Engineering, a Utah corporation, Plaintiff, vs. RALPH MEMMOTT, GRACE MEMMOTT, SANDRA MEMMOTT, SUE MEMMOTT, DELBERT CRAPO, SYRELDA CRAPO, TRENT CRAPO and KENT CRAPO, Defendants.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 5891 Hon. Ray M. Harding

This matter came on for hearing on the 6th day of January, 1987, before the Honorable Ray M. Harding, Plaintiff appearing in person together with its attorney, Craig C. Coburn, and Defendants Ralph Memmott, Delbert Crapo and Susan Memmott appearing in person and together with their attorney, Gregory M. Holbrook, and witnesses having been sworn and testified and evidence taken and the Court being fully apprised in the premises, does hereby enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. That on October 17, 1983, Plaintiff and Defendant Ralph Memmott entered into a written contract whereby Plaintiff was to

provide certain surveying services to Defendant and Defendant agreed to pay an estimated fee of $6,000.00.

2. Defendant Ralph Memmott entered into said agreement individually and not for and on behalf of any of the other named Defendants.

3. There is no evidence that Defendant Ralph Memmott had arrangements with the other property owners for contribution for Plaintiff's services.

4. Plaintiff substantially performed the services contracted for and expended time and effort in excess of that estimated and such expenditures were reasonable. Plaintiff further provided all existing survey ties, location of Defendant's mine claims or relationship to the interstate highway as indicated on the Department of Transportation's highway strip maps and further provided said Defendant witht a GLO map showing the location of the interstate highway as it related to the Defendant's claims. Such survey work and office work as was performed by Plaintiff and the resulting work product was sufficient to substantially comply with the intent of the parties and to satisfy the needs of the Defendants.

5. Defendant Ralph Memmott failed and refused to compensate Plaintiff as agreed.

6. The contract in question provided for interest to be paid on all past due amounts at the rate of eighteen percent (18%) per annum.

7. The contract provided that in the event it became

necessary for Plaintiff to retain an attorney to collect under the contract, all costs of collection, including reasonable attorney's fees, were to be paid by Defendant Ralph Memmott.

8. Defendant Ralph Memmott's obligation to compensate Plaintiff became past due on October 29, 1984.

9. Plaintiff incurred $2,500.00 in attorney's fees in this matter exclusive of court costs.

10. There is no evidence that the other named Defendants have any liability under the Complaint or the subject contract.

CONCLUSIONS OF LAW

1. That there existed a valid and enforceable contract between Plaintiff and Defendant Ralph Memmott.

2. That Plaintiff substantially performed its obligations under said contract.

3. That Defendant Ralph Memmott breached his obligations under said contract.

4. That as a direct and proximate result of said breach, Plaintiff has been damaged in the amount of $6,000.00, and is entitled to Judgment in said amount.

5. That pursuant to said contract, Plaintiff is further entitled to interest on said amount calculated at eighteen percent (18%) per annum from and after October 29, 1984 through date of Judgment.

6. That pursuant to said contract, Plaintiff is entitled to attorney's fees in the amount of $2,500.00.

7. That Plaintiff is further entitled to Judgment representing court costs of $54.50 incurred in this matter.

8. Plaintiff has no cause of action against the remaining named Defendants in this matter.

DATED this 30th day of April, 1987.

BY THE COURT:

HON. RAY M. HARDING

CC3/EWP/FF

APPENDIX C

CRAIG C. COBURN #0688
Attorney for Plaintiff
8 East Broadway, Suite 735
Salt Lake City, Utah 84111
Telephone: (801) 355-1300

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTATH

ECKHOFF, WATSON, WATSON AND PREATOR ENGINEERING, INC., dba Eckhoff, Watson and Preator Engineering, a Utah corporation, Plaintiff, vs. RALPH MEMMOTT, GRACE MEMMOTT, SANDRA MEMMOTT, SUE MEMMOTT, DELBERT CRAPO, SYRELDA CRAPO, TRENT CRAPO and KENT CRAPO, Defendants.	AMENDED JUDGMENT Civil No. 5891 Hon. Ray M. Harding

This matter came on for hearing on the 6th day of January, 1987, before the Honorable Ray M. Harding, Plaintiff appearing in person together with its attorney, Craig C. Coburn, and Defendants Ralph Memmott, Delbert Crapo and Susan Memmott appearing in person and together with their attorney, Gregory M. Holbrook, and witnesses having been sworn and testified and evidence taken and the Court being fully apprised in the premises, and the Court having entered its Findings of Fact and Conclusions of Law, now therefore, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Plaintiff have judgment against Defendant Ralph Memmott in the principle amount of $6,000.00, plus interest

thereon from and after October 29, 1984 through date of Judgment at eighteen percent (18%) per annum ($2.96 per diem), attorney's fees of $2,500.00, and court costs of $54.50, plus interest thereon at the highest rate provided by law.

2. That Plaintiff's Complaint as against all other named Defendants is dismissed with prejudice.

DATED this 30th day of April, 1987.

BY THE COURT:

HON. RAY M. HARDING

CC3/EWP/JUDG

APPENDIX D

Steve Ward - State Attorney General

Eckhoff, Watson and Preator Engineering
580 North Main Street
Cedar City, Utah 84720
Phone: (801) 586-3004

Date: Oct. 2, 1983
Job No. _____

Ralph Memmott, hereinafter CLIENT, a(n) _____ does hereby authorize ECKHOFF, WATSON AND PREATOR ENGINEERING, hereinafter ENGINEER, corporation organized and existing under the laws of the State of Utah, to perform t services set forth below, subject to the terms and conditions set forth below and on t reverse side hereof.

A. Client Information (complete all items):
Name Ralph Memmott
Representative _____
Address 300 So. 300 E. P.O. Box 603
City Fillmore State Utah Zip 84631
Owner of Property Involved _____
Credit References _____

Delbert Crapo
Trent Crapo
743-6582
Phone 743-5456
Daughter - 224-4118

B. Project Description (attach Schedule if necessary):
Project Name Claim location, roadway location Client PO No. _____
Location Near Scipio, Utah
Estimated Completion Date: _____
Description of ENGINEER's Services: Location of placer ~~mining~~ claim on maps, field surveys of claims in reference to existing roadways, plat preparation, survey notes, consultations w/ attorney and clients, legal works as expert witness.

C. Compensation:

1. Basis (check and complete one (1)):

o ✓ Salary Cost and Reimbursable Expenses times multipliers.
Salary Cost Multiplier: 3.2 Est. Fee: $ 6,000.00
Reimbursable Expenses Multiplier: 1.15

o __ Lump Sum With Progress Payments (attach Schedule).

o __ Cost Plus Fixed Fee With Progress Payments (attach Schedule).

o __ Percentage of Construction Cost With Progress Payments (attach Schedule)

2. CLIENT shall pay a retainage fee of $_____, which fee shall be paid in fu prior to commencement of the work herein contemplated. Said fee shall applied to CLIENT's final payment for the services provided hereunde

D. CLIENT has read and understood the terms and conditions set forth on the reverse si hereof and agrees that such items are hereby incorporated into and made a part this agreement.

E. Having read, understood and agreed to the foregoing, CLIENT and ENGINEER, by a through their authorized representatives, have subscribed their names here effective the _____ day of _____, 19____.

CLIENT

Ralph Memmott
Title: _____
Date: 10/17/83

ECKHOFF, WATSON AND PREATOR ENGINEERING

Ralph E. Watson
Title: Principal Engineer
Date: Oct. 2, 1983

(Revised: 11/03/82

ARTICLE 1. DEFINITIONS

1.1 Salary Cost
The direct payroll expense for each employee engaged on the Project (computed by dividing the annual payroll cost (i.e., annual wages or salary) for such employee by 1868 hours), multiplied by 1.15 to cover payroll taxes and insurance incident to employment, multiplied by the number of hours worked by such employee on the Project. The direct payroll expense for overtime hours worked by an employee on the Project shall be multiplied by 1.725 (i.e., 1.5 x 1.15), provided that CLIENT has authorized such overtime.

1.2 Reimbursable Expenses
Expenditures made by the ENGINEER, its employees or its consultants in the interest of the Project. Reimbursable Expenses include but are not limited to:

1.2.1 Expense of transportation, subsistence and lodging when traveling in connection with the Project.

1.2.2 Expense of long distance or toll telephone calls, telegrams, messenger service, field office expenses, and fees paid for securing approval of authorities having jurisdiction over the Project.

1.2.3 Expense of all reproduction, postage and handling of drawings, specifications, reports or other Project-related instruments of service of the ENGINEER.

1.2.4 Expense of computer time including charges for proprietary programs.

1.2.5 Expense of preparing perspectives, renderings or models.

ARTICLE 2. COMPENSATION

2.1 Invoicing Procedure
CLIENT will be invoiced at the end of the first calendar month following the effective date of this Agreement and at the end of each calendar month thereafter. Such invoices shall reflect billing for work performed by ENGINEER during the month invoiced. Payment on an invoice is due upon receipt of the invoice by CLIENT. In the event of a dispute regarding a billing, CLIENT shall pay all undisputed amounts as per this Article.

2.2 Late Payment
ENGINEER may assess a carrying charge of 1.5 percent per month on invoice amounts due and not paid within thirty (30) days of the date of invoice, which charge CLIENT warrants will be paid on demand. ENGINEER may, in its sole discretion, suspend or terminate its services under this Agreement should CLIENT not satisfy any amount invoiced within forty-five (45) days of the date of invoice. ENGINEER further reserves the right to withhold any instruments of its service, or copies thereof, from CLIENT on any project pending payment on CLIENT's outstanding indebtedness.

ARTICLE 3. SPECIAL TERMS AND CONDITIONS

3.1 Additional Services
Services not expressly or implicitly included with those herein specified, as determined by ENGINEER, are not covered by this Agreement. Such services may be provided only upon execution of amendment in compliance with this Agreement.

3.2 Termination for Cause
This Agreement may be terminated by either party upon seven (7) days written notice should the other party fail substantially to perform in accordance with this Agreement through no fault of the party initiating the termination.

3.3 Termination Without Cause
This Agreement may be terminated by CLIENT upon at least seven (7) days written notice to ENGINEER in the event that the Project is permanently abandoned.

3.4 Termination Adjustment; Payment
If this Agreement is terminated through no fault of the ENGINEER, CLIENT shall, upon request, pay ENGINEER for services performed and Reimbursable Expenses incurred in accordance with this Agreement, plus a Termination Adjustment equalling fifteen percent (15%) of the estimated fee remaining to be earned at the time of termination to account for ENGINEER's rescheduling adjustments, reassignment of personnel and related costs incurred due to termination. Should CLIENT so terminate this Agreement, ENGINEER reserves the right to complete such of its services and a report on the services performed to date of termination to the extent that ENGINEER, in its sole judgment, deems necessary to place its files in order and/or to protect ENGINEER's professional reputation, for which an additional termination charge to cover the cost thereof in an amount not in excess of thirty percent (30%) of the charges incurred prior to the date of termination shall be paid by CLIENT upon ENGINEER's request.

3.5 Construction Estimates
Estimates of construction cost, material quantities and construction time estimates provided by ENGINEER under this Agreement are subject to change and are contingent upon factors over which ENGINEER has no control. ENGINEER does not guarantee the accuracy of such estimates.

3.6 Limitation on Liability
CLIENT limits ENGINEER's liability to CLIENT, contractors, subcontractors and their agents, employees and consultants, which may arise from or be due directly or indirectly to the professional acts, errors and/or omissions of ENGINEER, its agents, employees or consultants such that ENGINEER's aggregate liability to such parties does not exceed ENGINEER's fee or $ 50,000, whichever is less. CLIENT limits ENGINEER's liability to all other third parties which may arise from or be due directly or indirectly to such acts, errors, and/or omissions such that ENGINEER's total aggregate liability to all parties for such acts, errors and/or omissions does not exceed ENGINEER's fee or $ 50,000, whichever is greater. CLIENT limits ENGINEER's liability to CLIENT and all third parties which may arise from or be due directly or indirectly to ENGINEER's non-professional acts, errors, or omissions such that ENGINEER's total aggregate liability to all parties for all acts, errors and/or omissions, professional or otherwise, does not exceed $ 100,000. CLIENT shall indemnify ENGINEER, its agents, employees and consultants for liability in excess of the limits stated herein. For purposes of computing liability, liability shall include defense costs and attorneys fees. Prior to the beginning of performance of services hereunder, these limits may be increased up to ENGINEER's then effective coverage limits upon CLIENT's written request and agreement to pay an additional fee of 1/4% of the amount of any increase in coverage.

3.7 Limited Warranty
ENGINEER warrants that its findings, recommendations, specifications or advice provided hereunder will be promulgated and prepared in accordance with the standards of the consulting engineering profession in Utah. ENGINEER makes no other warranty or representation, express or implied, and CLIENT hereby expressly waives the same. Liability under this warranty is expressly limited as per Section 3.6.

3.8 Ownership of Documents
All original tracings, notes, data and other documents are instruments of professional service and shall be the property of ENGINEER. Modification, or use on other projects, of such instruments of service, or copies thereof, without ENGINEER's prior express written consent shall be at CLIENT's sole risk. CLIENT shall hold harmless, indemnify and defend ENGINEER as to any and all claims arising out of any such nonpermissive modification or use.

3.9 CLIENT Information
ENGINEER shall have the right to rely on any and all information supplied to ENGINEER by or through CLIENT or its representative, and shall not have a duty to verify the accuracy of such information unless otherwise agreed herein. CLIENT shall hold harmless, indemnify and defend ENGINEER as to any claims related, directly or indirectly, to ENGINEER's use of or reliance on any such information.

ARTICLE 4. GENERAL TERMS AND CONDITIONS

4.1 Applicable Law
This Agreement shall be interpreted and enforced according to the laws of the State of Utah.

4.2 Assignment; Subcontracting
Neither CLIENT nor ENGINEER shall assign its interest in this Agreement without the written consent of the other. ENGINEER may subcontract any portion of the work to be performed hereunder without such consent.

4.3 Force Majeure
Any delay or default in the performance of any obligation of either party under this Agreement resulting from any cause(s) beyond said party's reasonable control, shall not be deemed a breach of this Agreement. The occurrence of any such event shall suspend the obligations of said party as long as performance is delayed or prevented thereby.

4.4 Attorney's Fees
CLIENT shall reimburse ENGINEER for any and all costs incurred in the collection of CLIENT's overdue account, including reasonable attorney's fees. In the event that CLIENT unsuccessfully asserts a claim against ENGINEER, at law or otherwise, for any alleged act, error and/or omission, professional or otherwise, alleged to arise out of or be due directly or indirectly to ENGINEER's performance of the professional services herefor contracted, CLIENT shall pay all costs, including reasonable attorney's fees, incurred by ENGINEER or its assignee(s) or subrogee(s) in defending against said claim.

4.5 Severability; Waiver
In the event any provisions of this Agreement shall be held to be invalid and unenforceable, the remaining provisions shall remain valid and binding upon the parties. One or more waiver of any term, condition or other provision of this Agreement by either party shall not be construed as a waiver of a subsequent breach of the same or any other provision.

4.6 Amendments; Merger
This Agreement may be amended only by written instrument expressly referring hereto and duly signed by the parties. This Agreement constitutes the entire and integrated agreement between the parties hereto and supercedes all prior negotiations, representations and/or agreements, written or oral.